A NARRATIVE, OR RESUMPTION

Of the ſeverall Proceedings in the Court of the Admiralty of *ENGLAND*, in order to the Ships *Sampſon*, St. *George*, and St. *Salvador*.

With what hath been ſayd and alledged for the releaſing of them and their reſpective Ladings:

BY

The Captaines of the ſayd Ships on the one ſide;

AND

By the Advocate Fiſcall of this Common-wealth on the other.

The 24. and 27. of January, 1653.

Stilo novo.

London, Printed in the Year, 1653.

HARVARD COLLEGE LIBRARY
MAY 1913
SUPPLEMENTARY FOR
ENGLISH HISTORICAL TRACTS

4807
30

To the Reader.

Reader,

THOU haſt here the *Allegations brought in the Admiralty Court of* England, *on the* 27. *of* January, *and the* 14. *of* February, *of this preſent yeare* $\frac{1652.}{1653.}$ *againſt the Arguments of the Advocate Fiſcall of the State, and the Anſwers by him invented, to the Deductions made for* Otto George, *Captain of the Ship called the* Sampſon: *Our diſcourſe is not large, for Truth needs not many words. Beſides, he that talketh much, expoſeth himſelfe to danger: And this is apt to happen chiefly in thoſe Controverſies, which are diſputed out of the Civill Law. For whoſoever doth delight himſelf in Rules, and uſe Maximes, if he abuſe particular Doctrines, muſt needs breed confuſion, & run himſelfe into everlaſting Diſputations. And it is harder to moderate him who is thus given and addicted, then to turn the courſe of the Sun, or ſtop the motion of the Heavens. But wee have contracted the buſineſſe, as much as might be, alleadging ſuch caſes as are ſutable to this Particular, and this, both to obey the Rules of our Profeſſion, and to the end wee might not become irkeſome and tedious unto the moſt wiſe and juſt Judges and Auditors.*

And in this matter it is to be admired that the States Advocate would needs bring us into theſe Debates and Diſputations: For, whereas there neither is, nor can be invented any caſe out

of the compasse of three, on which he might ground his Contradiction, viz. 1. *The case of an Enemies Ship with lading of Enemies.* 2. *Of an Enemies Vessell with lading of Friends.* 3. *Of a Ship being out of her course and way, and riding in an unaccustomed Road, or straying from her free bounds*; *He hath added a fourth, never heard of before. For this Ship* (*as also the other two, viz. St.* George, *and St.* Salvador) *tooke in fraight at* Cadiz *in* Spain, *which the Captain received from* Spaniards, *or Low-Country men there inhabiting, to be carried to* Ostend *in* Flanders, *and to be delivered and consigned there unto* Spaniards, *and Low-country men, Subjects of his Catholique Majestie: And two were taken lying at Anchor in the Downs of the English* * *Channell*; *and the third, whilst she was sayling in the same Channell: Neither could the freedome be mistrusted, either of the Lading or the Owners, seeing the Pursers Books and Bills of Lading do expresly shew, from whence and whither, from whom, and to whom, they were laden and sent. In which regard all further presumption ought to have ceased, seeing the Law of* NATIONS, *which permits the Goods of Enemies to be taken, hath here no place, and can be stretched no further. Wherefore we are forced to see, not only the violation of the Right of Nations and of Nature, but moreover of the Amity contracted between his Catholick Majesty and this Commonwealth. And furthermore this is an Example not heard of in former ages, which will give occasion to all the Princes of Europe to do the like unto English Ships that shall come to their Seas and Ports. Neither will they want grounds of a just excuse, seeing they may say, that they do not begin a new businesse, but follow a President and example first given & begun in* England.

* This is manifest by an Affidavit viewed & read in Parliam. 20 Decemb. 1652

And by the sole Antecedent Treatise, it appeares, how much damage this will bring unto the common Right of Nations, and how much it will prejudice all Countryes and people of Europe: All which (Reader) *hath been truly and faithfully set down, not to injure any one by it, for whosoever defends his owne Right, wrongs no man at all*; *nor he, that deduceth the reasons of natu-*

rall

rall Juſtice, and gives warning, to the end, that fatall examples may be avoyded and cancelled out of the Regiſters of the Admiralty, by Authority of the Parliament and Commonwealth. Becauſe ſo indeed that Court will make it ſelfe appeare truly Honourable, and purchaſe everlaſting fame. For Princes ought not to make account of any thing more, then that they become not Authors and introducers of an ill Example. And truly, as we hope for a juſt and right ſentence from the moſt juſt Judges, ſo we doubt not, but that the Parliament and Councell of State will take in good part our Demand for this Releaſement. Vale.

A NARRATIVE, OR RESUMPTION

Of the ſeverall Proceedings in the Court of the Admiralty of England, *&c.*

PREAMBLE.

I. *Part.*

THE Judges of the Admiralty Court on the 24. in the Forenoone gave an Order, that this Point or Article ſhould be diſcuſſed and diſputed, *viz. On whether Side or Party the Charge did fall, and obligation of proving, that the Ladings aboard the ſayd Ships doe not belong unto the States of* Holland, *or any of their Subjects.*

And on the ſame day from halfe an houre paſt two, till five in the afternoone, the Advocate Fiſcal made his Ver-

ball, intending by it that the obligation of proving lyeth wholly on the Captaines of theſe Ships, grounding himſelfe chiefly on three kinds of Arguments.

Arguments of the firſt kinde.

§. 1.

FIRST, He alleadged, That to private Letters and Writings, and conſequently to the Captaines Letters of Cognizance, no beleife at all is to be given, becauſe they are ſuch as may be made and written by them at their owne pleaſure. To this he added, *Vocis Mortuæ nullam eſſe fidem ſed Voci vivæ eſſe credendum*, That no beleife is to be given unto a dead, but onely to a living Voice: And that therefore no beleife ought to be given unto the Letters of Cognizance, as being meerly dead Writings. And having layd theſe two grounds, he endeavoured to prove them by ſeverall Lawes and Authors, which he cited and read accordingly, in order to his ſeverall proofs.

Arguments of the ſecond kinde.

§. 2.

SEcondly, He alleadged divers Preſumptions to prove that the ſayd Ladings are Goods pertaining to *Hollanders*, or ſome of their Subjects.

The 1. *Preſumption* he drew from the negligence of the Proprietors, who have not appeared in Court to demand their Goods and Ladings; becauſe whoſoever is negligent in this kinde, is preſumed not to be the Maſter or Owner of them.

His 2. *Preſumption* was, That no body is preſumed, *Jactare ſuum*, to relinquiſh his own goods, and let them be loſt.

His 3. *Preſumption* was, That no body can be ſuppoſed to be owner of any Goods, if he truſt and commit them

to a Perſon that cannot be reſponſible, and give aſſurance and ſecurity that nothing ſhall be loſt.

His 4. *Preſumption* was, Becauſe *Mercatores inhiant lucro*, Merchants are much bent upon their owne gaine, ſo as not to expoſe their Goods to danger.

His 5. *Preſumption* was, That ſuch rich Ships as theſe, have never yet come to the Low-Countries for the Subjects of his Catholick Majeſty in thoſe parts, and that therefore theſe Ladings are not preſumed to be theirs.

His 6. *Preſumption* was, Becauſe a Contumacy doth caſt the proof on the Adverſary, whenſoever he is truely preſumed to be contumacious.

His 7. *Preſumption* was, Becauſe it argues *Malam fidem*, fraud and deceit, whenſoever any body doth neglect *Obviare Crimini*, to make meanes to put off a crime, which he is conſcious of, and that by this a Preſumption doth reſult from this his negligence.

And for further proof of theſe ſeverall Preſumptions he alledged divers Authors, citing their Ordinary Lectures, Counſells, and Deciſions, cheifly *Scaccia* and *Cabedo* a *Portuguez*, and out of theſe Authors he read ſuch peices, as concerned the aforeſaid Deductions.

Arguments of the third kinde.

§. 3.

THirdly, He alleadged a Letter with an Order ſent from the States of *Holland*, ſent to their Vice-Admiralls, commanding them to protect and convoy the *Hamborough* and *Eaſt-India* Ships, that were coming from *Spayne*, with Plate, to the end they might come ſafe to the Ports of *Flanders*, and *Holland*; whence he concluded, that the aforeſaid three ſhips, are ſurely laden with Hollanders goods. Beſides he alleadged a Miſſive Letter, Dated the fifteenth of *November*, 1652. in which is ſayd, That on the thirteenth of the ſayd Monteh, a rumour was running

at

at *Amſterdam*, the *Hague*, and in that place where the Letter was written, by which it was noiſed all about, that the *Holland* Fleet was taken by the *Engliſh*, which cauſed many a ſad countenance, *&c.* Whence he concluded, that the ſaid Letter did ſurely ſpeak of theſe very three Ships: And this he did exaggerate, and amplify very much.

Reſumptions of the 27 *of* January, 1653.

2. *Part.*

ON this Day the Captaines brought their Advocate to plead, which he did, from half an hour paſt two in the afternoon till five. And to make his anſwer, in a more fit and due order, he layd firſt ſuch legall grounds, as do exclude all neceſſity of proofe on the Captaines ſide, and caſt the ſame wholly on the Advocate *Fiſcall*, and Keepers of this Common-wealth; and ſayd, that it is received for a generall rule: *Ex facto jus oriri, quia jus in cauſâ poſitum eſt, cum jus ſine ſubjecto non ſtet*: that no legall Action can ariſe from nothing, but ought to have ſome cauſe for a Subſiſtence.

Secondly, He ſayd, that theſe three Ships were laden in the Port of *Cadiz*, to be unladen in the Port of *Oſtend*, both of them free Ports.

Thirdly, That the ſayd three Ships were detained, and ſeiſed in the Channel of *England*, two of them lying at Ancor, and the third going on her way.

Fourthly, That a free ſhip comming from a free Port bound for another Port alſo free, could not be ſeized on, in a free and freindly Sea.

Fifthly, That it belongs to the nature and Eſſence of an Arreſt and Seizure, (cheifly when it is without judgment) that he who cauſeth the Arreſt, do withall prove the Action he pretendeth, and this under pain of being Null.

Sixthly, *Titulum juſtum poſſidentis transferre onus probandi*

handi in detinentem eum, That the just Title of the possessor transferreth the Obligation of proving on the Detainer: that the Captains are just possessors, *Titulo locati & conducti*, by Title of contract, which Title is naturall, a Title of Nations and civill; that this contract was made in *Spayn* to unlade in the Port of *Ostend*: that it is lawfull for any body, *Bona sua ex domo sua ad aliam suam transferre, ex una civitate in aliam, ex uno regno seu provincia ad aliam*, to carry his goods from his own house to another belonging to him, from one Town or City to another, from one Kingdome or Province also to another, That he doth not forgoe his Title, *Mutando se de uno loco ad alium*, by transporting himself from one place to another; but only when he goeth from a free Place, to a place prohibited.

Seventhly, That whensoever any body argueth another to act or do any thing, *Contra edictum, legem, aut senatusconsultum*, against an Edict, Law, or Decree, he ought to prove the same, as when one argueth another of fraud or deceit, *Arguens dolum & fraudem sive agendo sive excipiendo.*

Eighthly, Because the Action pretended by the *Fiscall*, is *Actio commissi*, which is, *Actio rei vindicationis in rem scriptæ*, An Action of challenging a thing, written against the Owners and Possessors of the same, and that whosoever proceeds this way or acts *Rei vindicatione*, is lyable to the proof, and not the possessor: And so much the more in this present case, because the Fiscall himself, acknowledgeth in his Verbal of the 24. that this is a cause of *Rei vindicatio.*

Ninthly, That *Actio commissi*, is *Actio criminis*, or an Action of Crime, and therefore *Agens ad commissum*, he that acts in order to this crime, ought to prove the same expresly.

Tenthly, Because whensoever any body doth ask from another, either an Inventory, or Discription, or Specification, and in case the Judge do order the same by his Decree, if the other do (in conformity) present his Inventory, whosoever doth pretend that the Inventory is

not

not intire, binds himſelf to prove his own pretention, and this is in no way incumbent to him that made and preſented it; which generally takes place in Heirs, Tutors, Adminiſtrators, and in all others of the like nature; Namely in Maſters of Ships, Muletiers, Carriers of what kind ſoever, becauſe when a Maſter of a Ship doth teſtify and deliver up a ſpecification of his lading, he is to be beleived, ſpecially when he hath his Books about him, his Bill of lading, Letters of Cognizance, or other writings belonging to the ſame. All which was expreſly proved by ſeverall Texts and Allegations of the Law, by the Authority of Doctors, and by the Nature and neceſſity of Trading.

Third Part.

§. 1.

An Anſwer to the Arguments of the firſt kind.

THeſe Grounds being layd, The Fiſcalls Arguments were anſwered in this Order. To thoſe of the firſt kind, was replied thus, *Quod ſcriptura privata nuda & ſola non facit fidem ſed veſtita conſenſu*, that a private writing purely taken by it ſelf and *naked*, doth not indeed deſerve or claim unto it ſelf any beleif at all, unleſſe it be circumſtanced and *Veſted* with a conſent or ſome other Help; namely by a Cauſe or Oath, for a Cauſe doth in a manner *Cloath*, and *veſt* a Writing; the ſame doth an Oath or mutuall conſent. And ſeeing a Writing thus *veſted* with a mutuall conſent or other legall helps (as either a Cauſe or an Oath) is not any longer to be ſtiled, *Scriptura mortua ſed viva*, A dead but living Writing: Therefore the Booke called *De ſobordo*, and Letters of Cognizance, which declare the Contract, wherein the Maſter of the ſhip acknowledgeth to have received ſuch and ſuch Lading to be conſigned at their deſigned Port, are not dead but living Inſtruments: For the Writings of Contracts, whileſt the

the contracts themſelves do laſt, are to be ſtyled *Living*, ſtill ſpeaking for their owners, and withall having an effectuall reall Force, ſpecially if the contracts be made according to the cuſtome of the Country, for in this caſe they cauſe beleif, both with the Contractors and Externs, regard being ever had to the Place where the contract was made.

Anſwers to Arguments of the ſecond Kinde.

§. 2.

TO the Arguments of the ſecond Kind, it was anſwered, That *Preſumptiones juris at juris de jure*, which the Captains have for themſelves, do exclude all other, whatſoever alleadged by the *Fiscall*, ſpecially thoſe that are generall, in *Vago*, and not cloſe to the matter: For whereſoever any caſe of the Law is found, there is no Ground for any Preſumption, but the Law is forthwith to be put in Execution, unleſſe ſome caſe be alleadged contrary to the Law, and ſpecifically againſt it. And further, Anſwers were given individually to each of the aforeſayd Preſumptions in particular.

To the firſt was anſwered, That Negligence doth not argue any Effect of Dominion, but doth rather include the ſame, according to that Rule, *Quia non poſſet Uſucapio dici Adjectio Dominij, niſi eſſet etiam privatio.* Beſides, Negligence is neither preſumed, nor indeed probable, *Niſi per actus exteriores expreſſos*, unleſſe it be expreſſed by ſome exteriour Act, and is abſolutely excluded, whilſt the Owner is in poſſeſſion, and doth not enter, *Niſi ipſo mortuo aut deſiſtente, & quod extraneus occupaverit poſſeſſionem, negligente Domino eam tenere*, untill the Owner do either dye or deſiſt, or unleſs ſome Extern enter into poſſeſſion, and the Owner neglect to maintain the ſame. Neither can this be of any Force at all in this preſent caſe, where the Captains of the ſayd Ships appear in judgment both for themſelves and the Proprietors, and this by the very nature of the contract, ſo

as Non indigent Ratihabitione, they need no further Ratihabition, because by contracting, all things necessary to the Contract were already past. Moreover even from the beginning of this cause no body can deny, but that the Proctors Advocates, Agents, and Deputies of the Persons interessed have appeared in court, neither ought it to be omitted, that his highness the *Arch-Duke Leopold*, hath written and sent his own Declaration unto this Common-wealth, by whose Order I am come hither to be Advocate for the partys interessed; which you may add, that whosoever puts himself to such Expences in maintaining Proctors, Sollicitors, Advocates, and Agents, is not only not to be thought Negligent, but to deserve the name of Diligent.

To the second was answered, That he is not sayd, *Jactare suum*, to relinquish his own, who by that Act which he Exerciseth, doth not give away, but maintain his Goods for his own disposing and consignation.

To the 3d was answered, That he who consigneth his goods unto the Maister of a Ship, doth it meerly out of a necessity of Trading, reserving moreover to himself, an Action against the sayd Maister or Captain in case he fayl, which is both necessary, and also admitted by the Law it self: Wherefore no presumption can result from hence, the Law pleading quite the contrary.

To the fourth, *Viz.* That Merchants are eager upon their own Gain, it was answered, that this kind of Eagerness is allowed of, and no way condemned by the Law, because no body can gain without some hazard, *Et nemo se committit commercio nisi ali sine periculo*, no body ingageth in any traffick at Sea, without some Danger, *Et quod communiter fit ab omnibus non potest parere præsumtionem doli aut fraudis*; that which is usually practised by all, cannot breed any presumption of fraud or deceit.

To the fifth was answered, That Flemings and Subjects of his Catholick Majesty in the Low countreys and *Spain* are as capable of an increase of Riches and Purchase, as the people of any other Nation, seeing that both in *Spayne* and the *Indies* they

they have continuall occasion of commerce and Traffick, and consequently very rich Estates & Patrimonys, which capacity being once granted, the presumption ceaseth, & so much the more, because years are wont to pay one another, and a fruitfull year, doth often recompence a foregoing sterility, *Nec quod colonus ex fundo, uberiores fructus percipiat hoc ei fraudi est, nec contra eum præsumptio, nam nec ipse Dominus, nec Dominus ipsi nocere potest*, Neither ought a Tenant to suffer, because he reapeth more one year then another, and no presumption can therefore arise against him; for by this, neither can he indamage his Land-Lord, nor the Land-Lord indamage him, because according to a less or greater care and tillage, sterility or fruitfullness doth insue. The same happeneth in Merchandise and Trading, for sometimes the gayn continueth to be equall, and at other times growes either greater or less, and so by turns.

To the sixth presumption of contumacy, was answered, That there is no such thing in the present case, seeing the captains of the Ships, who ought to defend their Proprietors, do actually appear in court, whereas contumacy is understood to be, *Absentia comparere debentis aut præsentis latitatio*, the absence of a person, who ought to appear, or else his withdrawing or concealling himself, in case he be present, Wherefore he, that neither is absent, nor concealeth himself, cannot incur any contumacy at all, or the Effects thereof.

To the seventh presumption out of *Scaccia*, it was shewed and demonstrated, that he holdeth the quite contrary immediatly after that citation which was brought by the Advocate *Fiscall*, where he doth absolutely hold, *Negligentiam non esse causam immediatam amissionis Dominij, sed consensum; illumque debere præcedere absolutè, non causative, quia nunquam nascitur negligentia sine præcedente consensu, & illa nisi intercedente justo & legitimo tempore, quod esse decem annorum cum Doctoribus scribunt*, That negligence is not the immediat cause of the losse of Dominion, but a consent to the same, which ought absolutely to precede, for Negligence doth never arise without a preceding consent, nor the consent without

 out

out a full and legall ſpace of time, which is by all the Doctors aſſigned to be the Tearm of ten years.

To the Authority of Doctors, and to what was alledged out of their Lectures, Counſells and Deciſions, it was anſwered, that they could not be applyed to the preſent caſe, becauſe they ought to be underſtood according to the Laws & Texts by them alleadged, and ſeeing the Lawes and Texts to which they have reference, prove nothing in *Specie*, as appears by the Solutions, *Nec poſſit eſſe in exemplo plus quam in exemplato*, and ſeeing nothing can or ought to be in the Copy, more then is in the Patern, it was made clear that none of the Authorities alledged had any force at all: taking in alſo *Quod à ſeparatis, non fit illatio*, that from things wholly diſjoyned and ſeparate nothing at all could be inferred.

Anſwers to the Arguments of the third Kinde

§. 3.

TO the third kind of argument was anſwered, That the Order of the States of *Holland* of the 31. of *Auguſt*, 1652. is not authenticall; ſeeing the Letter declareth that it is a meer Extract of the Orignall, and the one was conferred with the other in the abſence of the Greffier or Secretary by ſome body elſe whoſe quality and condition is unknown, for no body can tell what manner of man he is.

Secondly, That both the Order and Letter, are ſuſpected to be fictitious, as being found in a ſmall Flemiſh Veſſell, whereas the *Hollanders* have Ships enough of their own, Meſſengers and Poſts to convey and ſend their Ordinances. Beſides, Neither the name is known, nor Country, nor family nor profeſſion of the Maſter of the aforeſayd little Veſſell, which argues a notorious preſumption of Falſity. Moreover though it ſhould be granted, that the Letters are not fictitious, yet would they prove nothing at all, as being procured by the Merchants of *Amſterdam* and other perſons there, intereſted in the Traffick of *Spayne*, whereas the Ships

not

not having any relation to those other, and the Lading of them having neither petitioned nor obtained any such order, questionless ought not to be comprehended in the aforesayd Order, either by that Rule *Quia extra territorium nemini paretur impune*, or by that other, *Quia res inter alios acta aliis non nocet nec prodest*. Furthermore the quality of the sayd Ships as being *Hamburgers*, doth not comprehend them in this Order, because their Ladings belong to *Spaniards* and Flemmings, and others who dwell in *Spayne* and *Flanders*, subject to his Catholick Majesty, or at least to Freinds of this Common-Wealth, such as the *Hamburgers* themselves are: And here ought to be noted, that a limited cause produceth a limited Effect. *Limitata causa producit limitatum Effectum, sicut inclusio unius est exclusio alterius, & non probat hoc esse quod ab hoc contingit abesse.*

As for the Letter exhibited by *Calandrin*, it was answered, That it neither had the name of any Author or Place, and that he who delivered it, is also a person unknowne; and that from the Fact it selfe ariseth an impossibility of the consequence; For the Ships were detained on the tenth of *November* 1652. and the rumour which was supposed to be spred, Whether it were then published in *England* or no, could not on the eleventh (which was a tempestuous day) nor on the two next ensuing, be carryed to *Amsterdam*, the *Hague*, and to the place from whence the Letter was written. And no body can without Miracle, or help of the Devill know, what is done in severall places at the same time. Moreover that Letter speaks of the *Holland* Fleet, and these three Ships are neither the body of that Fleet, nor any part of the same, as being free Vessels, and such as permit themselves to be hyred by those that demand and desire them. Besides, there is a Rule, that *Literæ Tertij ad Tertium non nocent Tertio*, Letters written by one to another cannot prejudice a third person, specially in order to Damage; *Nec incertæ & vagæ, tendentes ad offuscandam veritatem*, Nor such as are uncertaine, framed in the ayre, and tending to an offuscation or masking of the Truth,

not

not declaring *Originem famæ*, the ground and beginning of the Rumor they alleadge; which makes it appeare that this Letter is rather a supposititious Paper, forged and fained by some malevolous person, then written by an honest and plain-dealing man.

Lastly, It was sayd by way of a generall answer, That in this Cause of the *Fiscall*, there be not any legall demonstrations or Attestations which can produce any evidence, and that all this businesse ought to be proved by Witnesses, which is also according to the Custome of *England*; for no body can be condemned unlesse he be convicted by witnesse, or by his owne confession: Whence these following Conclusions are deduced.

I. *Conclusion.*

THAT by what hath been sayd and alleadged, it cleerly appeareth, That the Detention of the aforesaid Ships is wholly unjust, and that the Keepers and Fiscall have the proof incumbent on themselves, specially having already deduced some Presumptions and Allegeations against the Cases of the Law above declared, and which wholly contradict the Bookes called *De Soborno*, the Letters of Cognizance, the Inventory or Specification, and the Preparatory Judiciall Information received upon Oath, and withall because they oppose themselves unto the same, not onely by way of Action, but also Contradiction, as appeareth by the Acts.

II. *Conclusion.*

II. *Concluſion.*

THAT therefore an Order ought to begiven, That the aforeſayd Fiſcall come to the proof within ſome ſhort compaſſe of time, to avoyd expenſes, damages, and further intereſt, and in caſe he doe not ſo, within the time preſcribed, that then the Releaſe of theſe three Ships ſo often demanded, be at length granted; to the end their Captaines, according to their truſt and obligation may effectually conſigne them at their deſigned Port.

FINIS.